Supreme Court, U.S.
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No. 94-1529

In The

Supreme Court of the United States

October Term, 1994

MATTHEW C. HUDSON,

Petitioner,

v.

FIRST FIDELITY BANK, N.A., NEW JERSEY
(formerly known as First National State Bank),

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENT FIRST FIDELITY BANK'S BRIEF AND APPENDIX IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a Petition for a Writ of Certiorari should be granted requiring the United States Court of Appeals for the Third Circuit to reconsider Petitioner's argument that the form and entry of the Final Judgment of the United States District Court for the District of New Jersey (Gerry, C.J.), contravened Rules 54 and 58 of the Federal Rules of Civil Procedure and, therefore, is void, where: (1) the Petition fails to satisfy the prerequisite standards of Rule 10 of the United States Supreme Court; (2) Petitioner was provided with a plenary appellate review on the issue and was unsuccessful; (3) Petitioner's counsel consented to the form and entry of the Final Judgment that they presently challenge following the grant of Summary Judgment in favor of Respondent; (4) the Final Judgment otherwise complies in all respects with the word and spirit of Rules 54 and 58; and (5) Petitioner's avowed purpose of making such an argument is to circumvent the denial of their Federal Rule of Appellate Procedure 4(a)(5) Motion to Extend the Time to Appeal.

RULE 29.1 STATEMENT

The subsidiaries (other than wholly-owned subsidiaries) of Respondent First Fidelity Bank, N.A. (successor by consolidation to First Fidelity Bank, N.A., New Jersey) are as follows:

(1) Allentown Development Company, Inc.;

(2) Global Processing Alliance, Inc.;

(3) Fawn Run;

(4) 500 International Drive;

(5) Internet, Inc.;

(6) T. Towers A.C., Inc.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

RULE 29.1 STATEMENT ii

TABLE OF AUTHORITIES iv

COUNTERSTATEMENT OF THE CASE 2

REASONS FOR DENYING WRIT 7

ARGUMENT 9

1. Petitioner Was Provided With A Plenary Appellate Review On The Issue Of Whether The Form And Entry Of The Final Judgment Against Him Complied With The Word And Spirit Of Rules 54 And 58 Of The Federal Rules of Civil Procedure, And The Third Circuit's Affirmance of The District Court Does Not Conflict With The Decision Of Any Other Court Of Appeals 9

2. Petitioner's Counsel Consented To The Form And Entry Of The Final Judgment That They Presently Challenge Which Otherwise Complies In All Respects With Fed. R. Civ. P. 54 and 58 12

   (a) Petitioner's "Recital of Pleadings" Argument 14

   (b) Petitioner's Rule 58 Argument 17

3. Petitioner's Avowed Purpose Of Challenging The Form And Entry Of The Final Judgment Is To Circumvent The Denial Of Their Rule of Appellate Procedure 4(a)(5) Motion To Extend The Time To Appeal 19

CONCLUSION 21

TABLE OF AUTHORITIES

Page

CASES

Consolidated Freightways Corp. v. Larson, 827 F.2d 916 (3d Cir. 1987), *cert. denied* 484 U.S. 1032 (1988) 4, 11

Danzig v. Virgin Isle Hotel, Inc., 278 F.2d 580 (3d Cir. 1960) 16

Hall v. Community Mental Health Center, 772 F.2d 42 (3d Cir. 1985) 9, 19, 20

Harris v. Martin, 834 F.2d 361 (3d Cir. 1987) 10

Honneus v. Donovan, 691 F.2d 1 (1st Cir. 1982) 9, 11

Soderstrom v. Kunsholm Baking Co., 184 F.2d 756 (7th Cir. 1950) 15

Theriot v. ASW Well Serv., Inc., 951 F.2d 84 (5th Cir. 1992) 15

United States v. F. & M. Schaefer Brewing Co., 356 U.S. 227 (1958) 16

United States v. Indrelunas, 411 U.S. 216 (1973) 17

West v. Keve, 721 F.2d 91 (3d Cir. 1983) 9, 20

RULES

Federal Rule of Appellate Procedure 4(a)(5) 2, 6, 8, 11, 19

Federal Rule of Civil Procedure 54 ..... *passim*

Federal Rule of Civil Procedure 58 ..... *passim*

Federal Rule of Civil Procedure 60 ..... *passim*

MISCELLANEOUS

Federal Judicial Procedure and Rules (West 1993 Ed.) 16

10 C. Wright, A. Miller & A. Kane, *Federal Practice and Procedure*, § 2652 at p. 18 ..... 14, 15

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RESPONDENT FIRST FIDELITY BANK'S BRIEF AND APPENDIX IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent, First Fidelity Bank, N.A., New Jersey ("Respondent" or "FFB"), respectfully requests that this Court deny the Petition for Writ of Certiorari of Petitioner, Matthew C. Hudson ("Petitioner" or "Hudson"), because: (1) the Petition fails to satisfy the prerequisite standards of Rule 10 of the United States Supreme Court; (2) the Third Circuit considered and properly rejected Petitioner's argument that the form and entry of the Final Judgment entered in favor of FFB, and against Petitioner, was purportedly in violation of Fed. R. Civ. P. 54 and 58;

(3) following the grant of Summary Judgment in favor of Respondent, Petitioner's counsel consented to the form and entry of the Final Judgment that they presently challenge; (4) the Final Judgment otherwise complies in all respects with Fed. R. Civ. P. 54 and 58; and (5) Petitioner's avowed purpose of making such an argument is to circumvent the denial of their Federal Rule of Appellate Procedure 4(a)(5) Motion to Extend the Time to Appeal.

COUNTERSTATEMENT OF THE CASE

Pursuant to Opinions and Orders filed by the United States District Court for the District of New Jersey (Gerry, C.J.), on October 3, 1990, January 29, 1991, and June 18, 1991, FFB's Motions for Summary Judgment were granted as to Petitioner's liability under a written guaranty. (Petitioner's Appendix ("P.App.") A-67).

On March 25, 1992, FFB's counsel and Petitioner's Chicago counsel agreed to the form and entry of a Stipulation and Order entitling Petitioner to a sum certain credit in order to facilitate the entry of a Final Judgment. (P.App. A-68). On May 8, 1992, after several additional discussions between FFB's counsel and Petitioner's Chicago counsel, Petitioner agreed to the form and entry of the Final Judgment that was entered by the District Court. Petitioner now asserts that the Final Judgment was void for purportedly failing to comply with Fed. R. Civ. P. 54 and 58.

On May 13, 1992, FFB's counsel forwarded an original and one copy of the Stipulation, and the Final Judgment, to Petitioner's Chicago counsel. (Respondent's

Appendix "R.App." 3a-4a). Indeed, Petitioner's Chicago counsel concedes that:

> [O]n May 14, 1992, I received a form of Final Judgment . . . . On May 21, 1992, I received a copy of [FFB's counsel's] letter with enclosures transmitting the proposed judgment . . . to the Court's clerk with a request that they be given to Judge Gerry for his review and execution.[1]

On May 18, 1992, counsel for FFB did indeed mail the proposed Final Judgment to the Court for execution and entry. (R.App. 4a). A copy of the transmittal letter to the Court was mailed to both Petitioner's Chicago and New Jersey counsel. (R.App. 4a).

On May 19, 1992, the District Court (Gerry, C.J.) executed the Final Judgment. On May 20, 1992, Chief Judge Gerry filed the Final Judgment with the Clerk of Court. The Clerk of Court signed and entered the Final Judgment on May 22, 1992. (P.App. A-18-19).

On May 26, 1992, FFB's counsel received a copy of the Final Judgment as well as the Stipulation and Order

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[1] Although Petitioner has included in its Appendix the Certification of FFB's trial counsel submitted in opposition to Petitioner's alternative motions before the District Court, and to the Third Circuit, Petitioner has omitted a significant sentence that was included at paragraph 4 of the Certification which reads: "On May 8, 1992, after additional discussions, I forwarded a revised copy of the Final Judgment to Ms. Fair [i.e., Petitioner's Chicago counsel]." The significance of this omitted sentence is that it evidences Petitioner's Chicago counsel's involvement in actually drafting the proposed Final Judgment that was submitted to Chief Judge Gerry for consideration and entry. Respondent, FFB, therefore, has included the true and correct copy of the Certification in its Appendix. (R.App. 1a-4a).

from the Clerk of the Court. (P.App. A-69-70). On May 27, 1992, FFB's counsel sent a transmittal letter enclosing the Final Judgment to Petitioner's Chicago counsel and local New Jersey counsel. (P.App. A-70).

The time within which to file a Notice of Appeal expired on June 22, 1992. Petitioner, however, did not file a Notice of Appeal. On June 26, 1992, Petitioner's Chicago counsel telephoned FFB's counsel to determine whether the Final Judgment had been entered. (P.App. A-70). Petitioner's Chicago counsel were advised that the Court had entered the Final Judgment and that copies of the Final Judgment were sent to them and local New Jersey counsel under transmittal letter dated May 27, 1992. (P.App. A-71).

Petitioner's Chicago counsel, however, initially took the position that they had never received a copy of either the May 27, 1992 transmittal letter or the Final Judgment. (P.App. A-63-64). On June 29, 1992, after searching their offices, Petitioner's Chicago counsel confirmed receiving the May 27, 1992 transmittal letter indicating that Final Judgment had been entered on June 1, 1992, twenty-one (21) days before the time to appeal had expired. (P.App. A-64). Petitioner's Chicago counsel, however, then maintained that since they could not also locate the Final Judgment that was enclosed by FFB's counsel, they must have never received it with the transmittal letter. (P.App. 63-64).

On June 29, 1992, Petitioner's Chicago counsel telephoned Petitioner's New Jersey counsel to determine whether they had received the May 27, 1992 transmittal letter and Final Judgment from FFB's counsel. (R.App.

9a). Petitioner's New Jersey counsel advised Chicago counsel that "he did not recall having received it but would have to check the file." (R.App. 9a). New Jersey counsel "called back within a few moments to say he had received [the] letter with its enclosures [i.e. the Final Judgment]." (R.App. 9a). New Jersey counsel received the transmittal letter and Final Judgment on May 28, 1992, twenty-five (25) days before the time to appeal had expired. (P.App. A-73).

On July 14, 1992, Petitioner filed a Fed. R. App. P. 4(a)(5) Motion to Enlarge the Time to File a Notice of Appeal ("Rule 4(a)(5) Motion") urging that the failure to timely file a Notice of Appeal was the result of "excusable neglect." Petitioner alternatively made a Fed. R. Civ. P. 60(b)(4) Motion to Vacate Final Judgment ("Rule 60(b)(4) Motion") on the grounds that the Final Judgment allegedly did not comply with Rules 54 and 58 of the Federal Rules of Civil Procedure. Petitioner asserted that the May 22, 1992, Final Judgment was void, and must be reentered thereby causing the appeal period to run anew. (P.App. A-20-38).

The District Court denied Petitioner's alternative Motions by Opinion and Order dated October 21, 1992. Chief Judge Gerry, after analyzing the factors set forth in *Consolidated Freightways Corp. v. Larson*, 827 F.2d 916 (3d Cir. 1987), *cert. denied* 484 U.S. 1032 (1988), found that the conduct in failing to timely file a Notice of Appeal did not rise to the level of excusable neglect. (AP0098-0102). (P.App. A-25-33).

Judge Gerry also correctly held that Petitioner's Rule 60(b)(4) Motion was without merit because the Final

Judgment neither violated the word or spirit of Rules 54 and 58 of the Federal Rules of Civil Procedure. (P.App. A-33-37).

On November 24, 1993, Petitioner filed a Local Rule 12I Motion for Reconsideration of the denial of his Rule 4(a)(5) Motion. In his Motion for Reconsideration, Petitioner argued that the District Court overlooked certain facts in finding that New Jersey counsel's omissions did not rise to the level of excusable neglect. Petitioner also argued that the District Court overlooked certain legal authority which he claimed urged a finding of "excusable neglect" by Chicago counsel. (P.App. A-39-48). Petitioner did not seek reconsideration of the denial of his Rule 60(b)(4) Motion. On March 17, 1993, the District Court denied Petitioner's Motion for Reconsideration. (P.App. A-39-48).

Petitioner filed a Notice of Appeal on April 1, 1993 seeking to challenge the denial of both his Rule 60(b)(4) and Rule 4(a)(5) Motions. (P.App. A-78-79).

On October 26, 1993, oral argument was entertained by the Third Circuit (Becker, Roth and Lewis, *Circuit Judges*). By Memorandum Opinion of the Third Circuit (Lewis, *Circuit Judge*), dated October 27, 1994, the Third Circuit affirmed the District Court's denial of Petitioner's Rule 60(b)(4) Motion to Vacate and Rule 4(a)(5) Motion to Extend the Time to Appeal. (P.App. A-1-17).

With regard to Petitioner's Rule 60(b)(4) Motion to Vacate on the grounds that the Final Judgment did not comply with certain technical requirements of Rules 54 and 58 of the Federal Rules of Civil Procedure, the United States Court of Appeals for the Third Circuit affirmed the

District Court's denial of the motion having held that "[b]ecause we find no merit with respect to Hudson's contentions in this regard, we conclude that the district court did not abuse its discretion . . . . " (P.App. A-8). Petitioner's Motion for Rehearing was also denied by the Third Circuit.

REASONS FOR DENYING WRIT

Respondent respectfully submits that the Court should deny the Petition for Writ of Certiorari. In the first instance, no provision of Rule 10 of the United States Supreme Court is implicated by the Petition, and it is therefore procedurally deficient. The Third Circuit's decision in this matter is not in conflict with the decision of another United States court of appeals, no federal questions are involved, and there has been no departure by the Third Circuit or United States District Court for the District of New Jersey from any accepted and usual judicial proceeding.

Substantively, Petitioner was not denied a plenary review by the Third Circuit regarding whether the Final Judgment entered against him complied with the word and spirit of Rules 54 and 58 of the Federal Rules of Civil Procedure. The Third Circuit considered the legal arguments raised by Petitioner and found that the arguments were without merit. Therefore, the Third Circuit held that the denial of Petitioner's Rule 60(b)(4) Motion to Vacate was not an abuse of discretion.

In any event, the Final Judgment complies in all respects with the word and spirit of Rules 54 and 58. It

does not contain a "recital of the pleadings" as Petitioner suggests. The Final Judgment is also clearly marked "Final Judgment" and complies with the "separate document" requirement of Rule 58 of the Federal Rules of Civil Procedure. Moreover, Petitioner's counsel makes no argument that they were confused as to whether the "Final Judgment" was indeed a Final Judgment as opposed to an Order granting summary judgment thereby causing them to fail to timely file a Notice of Appeal. To the contrary, Petitioner's counsel concedes that they actually participated in the drafting of the Final Judgment that they now challenge, and they consented to its form and entry.

Petitioner's argument that the Final Judgment should have been prepared by the Clerk of Court under Rule 58, and not by and between counsel, is without moment and otherwise ignores Local Rule 22 of the United States District Court for the District of New Jersey. Whether the Clerk prepared the Final Judgment has nothing to do with why Petitioner's counsel failed to timely file a Notice of Appeal from the Final Judgment. Local Rule 22 requires counsel to submit a proposed form of Final Judgment to the court for consideration and entry. Additionally, the Clerk of the Court did, in fact, sign and enter the Final Judgment after it was signed by Chief Judge Gerry.

The Petition for Writ must also be denied because Petitioner's attempt to use Rule 60(b) of the Federal Rules of Civil Procedure to vacate the Final Judgment is aimed at circumventing the stringent "excusable neglect" standard of Rule 4(a)(5) of the Rules of Appellate Procedure (under which he was unsuccessful), for the sole purpose

of attempting to cause the time to appeal to run anew. In *Hall v. Community Mental Health Center*, 772 F.2d 42, 43 (3d Cir. 1985), the Third Circuit rejected such a "maneuver" as inappropriate because it "could have the effect of nullifying Rule 4(a)(5) altogether." (*citing West v. Keve*, 721 F.2d 91 (3d Cir. 1983)).

ARGUMENT

1. Petitioner Was Provided With A Plenary Appellate Review On The Issue Of Whether The Form And Entry Of The Final Judgment Against Him Complied With The Word And Spirit Of Rules 54 And 58 Of The Federal Rules of Civil Procedure, And The Third Circuit's Affirmance Of The District Court Does Not Conflict With The Decision Of Any Other Court Of Appeals

Petitioner erroneously argues that the Third Circuit did not provide him with plenary review on the issue of whether the Final Judgment entered against him was "void" for purportedly failing to comply with Rules 54 and 58 of the Federal Rules of Civil Procedure. Petitioner first argues that the issue of whether a Final Judgment is "void" under Rule 60(b) is subject to plenary review and not reviewable for an abuse of discretion. (Petitioner's Brief at 15-18) (*citing Honneus v. Donovan*, 691 F.2d 1, 2 (1st Cir. 1982)). Petitioner then argues that the Third Circuit affirmed the District Court's denial of his Rule 60(b) Motion to Vacate the Final Judgment under an erroneous "abuse of discretion" standard. (Petitioner's Brief at 15-18).

As properly noted by the Third Circuit, the denial of a Rule 60(b) Motion is, in fact, reviewed for an "abuse of discretion." *Harris v. Martin*, 834 F.2d 361, 364 (3d Cir. 1987). In the *Honneus* decision cited by the Petitioner, the appellant appealed the denial of his Rule 60(b) Motion to Vacate on the grounds that the district court lacked subject matter jurisdiction. The First Circuit recognized that: "An order ruling on F.R.Civ.P. 60(b) . . . is ordinarily reviewable only for an abuse of discretion." 691 F.2d at 2. Although the First Circuit did recognize that the scope of review regarding whether a final judgment may be "erroneous" in some respect is plenary, it acknowledged that the trial judge nonetheless has discretion to determine whether the purported error renders the Final Judgment "void":

> However, the concept of void judgments is narrowly construed. . . . It was settled by the Supreme Court at a very early day, that, although the judgments and decrees of the Circuit Courts might be erroneous, if [for instance] the records failed to show facts on which the jurisdiction of the court rested . . . , they were not nullities.

Id.

While the "scope of review" of a district court's interpretation and application of certain Rules, such as Rules 54 and 58, may be plenary, the propriety of the grant or denial of relief is still limited to an abuse of discretion "standard of review." For example, the Third Circuit's review of whether the district court below

applied the correct legal standard in considering Petitioner's Rule 4(a)(5) Motion was plenary. Having concluded that Chief Judge Gerry applied the correct legal standard, Chief Judge Gerry's application of the standard, however, was reviewable only under an "abuse of discretion" standard. *See, e.g., Consolidated Freightways Corp. v. Larson*, 827 F.2d 916, 919 (3d Cir. 1987), *cert. den. sub. nom.*, 484 U.S. 1032 (1988).

In the instant case it is clear that the Third Circuit provided Petitioner with a plenary review of the issue of whether the Final Judgment was void, summarily rejected such an argument as being without merit, and then affirmed the District Court's decision under an abuse of discretion standard. In rejecting Petitioner's argument that the Final Judgment did not comply with Rules 54 and 58, the Third Circuit specifically held:

> *Because we find no merit with respect to Hudson's contentions in this regard,* we conclude that the district court did not abuse its discretion . . . .

(emphasis supplied). (Petitioner's Brief at 17).

In sum, then, contrary to Petitioner's assertion, there is no conflict between the Third Circuit's decision in this matter, and the First Circuit's decision in *Honneus* and, therefore, no basis upon which to bring this Petition under Rule 10 of the United States Supreme Court.

2. Petitioner's Counsel Consented To The Form And Entry Of The Final Judgment That They Presently Challenge Which Otherwise Complies In All Respects With Fed. R. Civ. P. 54 and 58

Petitioner's challenge to the form and entry of the Final Judgment is capricious and ridicules the purpose of Rules 54 and 58 of the Federal Rules of Civil Procedure. The general purpose of Rule 54 and 58 is to ensure that Final Judgments are not confused, for instance, with general verdicts and Orders granting summary judgment so that the parties know when the time to appeal begins to run and ends. Petitioner's counsel not only participated in drafting the Final Judgment, but consented to its form and entry. The document is specifically marked "Final Judgment", is signed by Chief Judge Gerry and the Clerk of Court, consists of two short paragraphs, and even includes the post-judgment interest rate.

Petitioner's counsel makes no assertion that they confused the Final Judgment with a mere Opinion or Order granting Summary Judgment, and therefore failed to file a timely appeal. To the contrary, Petitioner's New Jersey counsel admits to having received the Final Judgment, but never tracking the time to appeal. Petitioner's Chicago counsel admits to having received the transmittal letter enclosing the Final Judgment (which they misplaced for over a month), and apparently lost the Final Judgment that was enclosed. Both counsel have acknowledged that they were well aware that the entry of the Final Judgment was what would start Petitioner's time for filing an appeal.

Given these events, and in an attempt to renew the appeal period, Petitioner argues that the Final Judgment is void because: (1) it allegedly contains a "recital of the pleadings" purportedly in contravention of Rule 54; (2) counsel to the parties, as opposed to the Clerk, prepared the Final Judgment purportedly in contravention of Rule 58 (although same is expressly provided for by Rule 58 and Local Rule 22 of the United States District Court for the District of New Jersey); (3) the Clerk did not sign the Final Judgment before entering it also allegedly in contravention of Rule 58 (which is a blatant misrepresentation because as noted by the District Court, the Final Judgment was signed by both Chief Judge Gerry and the Clerk), (P.App. A-37); and (4) the Clerk allegedly did not prepare a Minute Order indicating that the Final Judgment has been signed even though the Minute Order is included in the Appendix of Petitioner, and indicates that Chief Judge Gerry and the Deputy Clerk signed the Final Judgment.[2]

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[2] This is the third time that the Petitioner has attempted to claim that the Final Judgment was not signed by the Clerk even though the Final Judgment is clearly marked: "ENTERED ON THE DOCKET on May 22, 1992 WILLIAM T. WALSH, CLERK By /s/ JTO, DEPUTY CLERK. In Petitioner's printed reproduction of the Final Judgment included in his Appendix at A-18 and A-19, he includes a reproduction which would lead this Court to believe that neither Chief Judge Gerry nor the Clerk had ever signed the Final Judgment. A reproduction of the Clerk's stamp and signature does not even appear on Petitioner's reproduction. A true reproduction of the Final Judgment is included in Respondent's Appendix. (R.App. 5a-6a).

(a) Petitioner's "Recital of Pleadings" Argument

Rule 54(a) of the Federal Rules of Civil Procedure provides that: "A judgment shall not contain a recital of the pleadings, the report of a master, or the record of prior proceedings . . . . " *See* Fed. R. Civ. P. 54(a). Petitioner contends that the Final Judgment violates this provision of Rule 54(a) and, therefore, is void because it contains the following language:

> Plaintiff, First Fidelity Bank, N.A., New Jersey, having filed a motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, and the Court having filed opinions dated October 3, 1990, February 1, 1991, and June 18, 1991, ...

(P.App. A-18, 34).

In affirming Chief Judge Gerry of the District Court, the Third Circuit recognized the correctness of the District Court's holding that: "[In the first instance] . . . it is not at all clear that the short 'recital' contained in this judgment is violative of the rule." *Id.* (*citing* 10 C. Wright, A. Miller & A. Kane, *Federal Practice and Procedure*, § 2652 at p. 18). Wright & Miller cite to Official Forms 31 and 32 which compare favorably with the language of the Final Judgment entered by the District Court. *Id.* Official Form 31, for instance, provides: "This action came on for trial before the Court and jury, . . . and the issues having been duly tried and the jury having returned its verdict . . . . " *Id.*

The decisional law interpreting Rule 54(a) has uniformly held that the type of language that is prohibited by the Rule is language which could lead to confusion

about whether a Final Judgment is indeed a Final Judgment and therefore appealable, or simply a judicial opinion or non-dispositive document which a litigant would expect to be followed by a separate Final Judgment from which the time to appeal would run. These concerns, and the decisional law expressing same, however, are inapposite to the case at bar. For example, in *Soderstrom v. Kunsholm Baking Co.*, 184 F.2d 756, 758 (7th Cir. 1950), the district court's adoption of a lengthy master's report including extensive exhibits with no dispositive orders of any kind was held not to be a Final Judgment under Rule 54, and an appeal therefrom was dismissed. Similarly, in the more recent decision of *Theriot v. ASW Well Serv., Inc.*, 951 F.2d 84 (5th Cir. 1992), a district court's decision granting summary judgment was deemed not to be a Final Judgment in accordance with Rule 54, and Rule 58's "separate document" requirement, thereby resulting in the dismissal of the appeal.

Assuming, *arguendo*, that the Final Judgment's alleged "recital of the pleadings" in this case could somehow be deemed extraneous, the lower courts recognized that this provision of Rule 54 is not to be strictly applied: " '[a]lthough a judgment that contains extraneous matter is contrary to the spirit of Rule 54(a), if it is otherwise proper, is should be given effect.' " (P. App. A-34) (*citing* 10 C. Wright, A. Miller & A. Kane, *Federal Practice and Procedure*, § 2652 at p. 18).

Finally, when analyzing the purpose of Rule 54(a), it becomes abundantly clear that the Petition for Writ is without merit. The purpose of Rule 54's admonition against including extraneous language within a Final

Judgment is to ensure compliance with Rule 58's "separate document" requirement. As noted in the Comments to the 1963 Amendment to Rule 58:

> Hitherto some difficulty has arisen, chiefly where the court has written an opinion or memorandum containing some apparently directive or dispositive words, e.g., "the plaintiff's motion for summary judgment is granted . . . . " [citation omitted]. Clerks on occasion have viewed these opinions or memoranda as being in themselves a sufficient basis for entering judgment . . . . [I]t has become a matter of doubt whether the purported entry of judgment was effective, starting the time running . . . for the purpose of appeal.

See Federal Judicial Procedure and Rules (West 1993 Ed.) at 175 (*citing United States v. F. & M. Schaefer Brewing Co.*, 356 U.S. 227 (1958); *Danzig v. Virgin Isle Hotel, Inc.*, 278 F.2d 580 (3d Cir. 1960)).

In this case, there is no dispute that the Final Judgment at issue complies with the "separate document" requirement of Rule 58. The Final Judgment is two short paragraphs, and is a separate document from the Orders and decisions granting summary judgment. The Final Judgment is clearly marked "Final Judgment," and it was signed by both the Clerk and Chief Judge Gerry, and filed and entered by the Clerk. Moreover, the Petitioner does not make any argument that it was confused regarding whether the Final Judgment was indeed a Final Judgment from which the time to file a Notice of Appeal accrued. To the contrary, Petitioner participated in the drafting and consented to the form and entry of the Final Judgment. From Petitioner's perspective, the only real problem with

the Final Judgment is that Petitioner neglected to file a timely Notice of Appeal.

(b) Petitioner's Rule 58 Argument

Rule 58 of the Federal Rules of Civil Procedure provides in pertinent part that: "the clerk, unless the court otherwise orders, shall forthwith prepare, sign and enter the judgment . . . . " Petitioner argues that: "Here, the final judgment was not prepared by the clerk, nor was it signed by him. The executed Final Judgment was prepared by First Fidelity's attorney." (Petitioner's Brief at 14).[3]

Relying on *United States v. Indrelunas*, 411 U.S. 216 (1973), the Petitioner then argues that Rule 58 must be "mechanically applied," and since the Final Judgment was not prepared by the District Court Clerk, it is void. As properly noted, however, by the District Court, and affirmed by the Third Circuit:

> *Indrelunas* involved a violation of the separate document rule and held specifically that this aspect of Rule 58 – not the entire Rule – must be 'mechanically applied.' The Court based its reasoning on the purpose behind the separate document rule, which was to ensure greater

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[3] As noted above, Petitioner's claim that the Clerk did not sign the Final Judgment is an unmistakable misrepresentation of fact. Indeed, as noted by the District Court: "Finally, defendant argues that the judgment was not signed by the clerk. In fact, the judgment has been stamped "Entered" and that stamp *has been signed by the clerk . . . .* " (emphasis supplied) (P.App. at A-37).

> certainty about when final judgment has been entered . . . . The purpose behind Rule 58's requirement that judgments be drafted by the court, in contrast, has nothing to do with ensuring certainty as to when judgment has been entered. Rather its purpose is to avoid delays in the entry of judgment. [citation omitted]. Thus, a violation of this aspect of Rule 58 does not implicate the adequacy of notice to the litigants, and we therefore do not find the *Indrelunas* holding appropriate or controlling here. Indeed, defendant has not cited any cases in which *Indrelunas* has been applied to this aspect of Rule 58.

(P.App. A-37).

The District Court also held, and the Third Circuit affirmed, that: "The preparation of final judgments by attorneys, is, in fact, expressly authorized under Local Rule 22B." Thus, by the adoption of Local Rule 22B, the United States District Court for the District of New Jersey has "otherwise ordered" attorneys to submit proposed forms of Final Judgment for consideration and entry. *See* Fed. R. Civ. P. 58. Petitioner's counsel actually participated in reviewing the Final Judgment on several occasions prior to submission to Chief Judge Gerry for consideration and entry. Petitioner's argument that the Final Judgment should be deemed void because it was not prepared by the Clerk is simply frivolous.

For these reasons, Petitioner's arguments that the Final Judgment violates Rules 54 and 58 of the Federal Rules of Civil Procedure should be rejected.

3. Petitioner's Purpose Of Challenging The Form And Entry Of The Final Judgment Is To Circumvent The Denial Of Their Rule of Appellate Procedure 4(a)(5) Motion To Extend The Time To Appeal

In *Hall v. Com. Mental Health Center*, 772 F.2d 42 (3d Cir. 1985), the Third Circuit held that a would-be appellant should not use a Rule 60(b) Motion to Vacate Final Judgment in an attempt to circumvent the strict constraints of a Fed. R. App. P. 4(a)(5) Motion.

Since Petitioner does not challenge the holdings of the District Court and Third Circuit denying his Rule 4(a)(5) Motion to Extend the Time to Appeal, the instant Petition for Writ of Certiorari is an attempt to accomplish the same type of procedural maneuvering criticized in *Hall*.

The Third Circuit's holding in *Hall* is particularly apposite in the instant matter:

> The rule in this circuit with respect to the use of Rule 60(b) to vacate and reenter final judgments is stated in *West v. Keve*, 721 F.2d 91 (3d Cir. 1983), which at the outset would seem to preclude the maneuver requested by Hall. In that case, the appellant had moved the district court under Rule 60(b) to reinstate the earlier judgment and essentially revive his time for appeal . . . , which had lapsed according to the limitations of Rule 4(a). We held that Rule 4(a), being more specific to the appellate process than Rule 60(b), should control the timing of the filing of appeals, especially in view of the fact that allowing the use of Rule 60(b) to circumvent the constraints of Rule 4(a) could have the effect of nullifying Rule 4(a)(5) altogether. . . . We held

> finally, *'that because the avowed purpose of the Rule 60(b) motion in this case was to extend the time for appeal, it had to meet the time limitations of Rule 4(a).'*

Id. at 44 (emphasis supplied).

Despite the admonition of *Hall*, Petitioner, of course, argues that the District Court's denial of his Rule 60(b) Motion, which was filed *after* the time to appeal had expired, was in error because the Final Judgment was not "technically" a Final Judgment as set forth above. His "avowed purpose" in filing the Rule 60(b) Motion was the same as the would-be appellant in *West*; that is, to have the Final Judgment vacated and reentered so that his time to appeal would run anew.

In accordance with the holdings in *Hall* and *West*, then, Petitioner's argument that the Final Judgment should be vacated and reentered is a procedural maneuver which must be rejected.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Counsel of Record
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(609) 795-2121

Dated: April 12, 1995

No. 94-1529

In The

Supreme Court of the United States

October Term, 1994

MATTHEW C. HUDSON,

Petitioner,

v.

FIRST FIDELITY BANK, N.A., NEW JERSEY
(formerly known as First National State Bank),

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

RESPONDENT FIRST FIDELITY BANK'S APPENDIX TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

TABLE OF CONTENTS OF APPENDIX

Page

Certification of Paul Kizel in Opposition to Defendant's Motion to Extend Time to Appeal..... 1a

Final Judgment of the District Court..... 5a

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First Fidelity Bank, N.A.

BY: DAVID B. BACON, ESQUIRE (DB 0028)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

FIRST FIDELITY BANK, N.A. NEW JERSEY (formerly known as First National State Bank), Plaintiff, v. MATTHEW C. HUDSON, Defendant.	Civil Action No. 88-5550 (JFG) Date of Argument: September 4, 1992

CERTIFICATION OF PAUL KIZEL IN OPPOSITION TO DEFENDANT'S MOTION TO EXTEND TIME TO APPEAL

(Filed Aug. 7, 1992)

1. I am an attorney admitted to practice in the State of New Jersey. I am a member of the firm of Ravin, Sarasohn, Cook, Baumgarten, Fisch & Baime, former counsel for Plaintiff, First Fidelity Bank, N.A., New Jersey in this action. I have personal knowledge of the facts set forth herein.

2. Pursuant to Opinions and Orders filed by this Court on October 3, 1990, January 29, 1991, and June 18, 1991,

Plaintiff's Motion for Summary Judgment was granted as to Defendant's liability under a written guaranty executed by Defendant in favor of Plaintiff. See Exhibits A, B and C.

3. The only outstanding issue remaining after the June 18, 1991 Opinion and Order was whether Defendant was entitled to a credit equal to the value of certain real estate which served as collateral for the debt obligation guaranteed by the Defendant and, if so, the amount of the credit. *See* Order attached as part of Exhibit C. The June 18, 1991 Order scheduled a hearing on July 3, 1991 to consider this issue. *Id.* However, prior to July 3, 1991, I had conversations with Lisa Fair, an attorney with the Law Office of Michael Rovell, the Chicago-based co-counsel for the Defendant (the "Rovell Firm"), concerning the possibility of avoiding the need for a hearing by having the parties mutually agree that Defendant was entitled to a credit and upon the amount of the credit. Prior to the July 3, 1991 hearing date either I and/or Lisa Fair contacted the Court and advised that the parties were attempting to resolve the remaining issue without the need for a hearing. As a result the hearing was adjourned without date.

4. By letter dated March 25, 1992, after several conversations with Ms. Fair concerning the amount of the credit, I forwarded a proposed Stipulation and a proposed Final Judgment to Lisa Fair, with a copy to Robert Nussbaum, an associate with Defendant's New Jersey counsel, Saiber, Schlesinger, Satz & Goldstein (the "Saiber Firm"). See Exhibit D. On April 1, 1992, after I discussed certain revisions with Ms. Fair, I forwarded revised forms of the documents to Ms. Fair. *Id.* On May 8, 1992, after additional discussions, I forwarded a revised copy of the Final Judgment to Ms. Fair. *Id.* On May 13, 1992, I forwarded an original and one copy of both the

final versions of the Stipulation and Final Judgment to Ms. Fair for execution. *Id.*

5. On May 18, 1992, I sent a letter to the Court enclosing an original and one copy of the Stipulation and Final Judgment. Copies of the letter and enclosures were simultaneously forwarded to Lisa Fair by fax and regular mail and to Robert Nussbaum by regular mail. *See* Exhibit E.

6. On or about Tuesday, May 26, 1992, I received executed and conformed copies of the Stipulation and Final Judgment from the Clerk of the District Court.

7. On May 27, 1992 I sent a letter via regular mail addressed to "Michael J. Rovell, Esq. 55 West Monroe Street, Suite 3300, Chicago, Illinois 60603, Attn: Lisa Fair, Esq." enclosing copies of the Stipulation and Final Judgment. A copy of the letter and enclosures were also forwarded to Robert Nussbaum by regular mail. See Exhibit F.

8. I did not receive any communication from Lisa Fair, Michael Rovell, Robert Nussbaum or any other person from the Rovell Firm or Saiber Firm until the late afternoon of Friday, June 26, 1992 when I received a call from Lisa Fair who informed me that Michael Rovell was also on the line. They both asked whether I knew about the status of the entry of the Final Judgment. I told them that I received copies of the Stipulation and Final Judgment several weeks earlier from the Clerk and sent those documents to both Ms. Fair and Mr. Nussbaum. At their request, on June 26, 1992, I instructed my secretary to again send a copy of the May 27, 1992 letter and Final Judgment to Mr. Rovell's office.

I hereby certify that the foregoing statements are true. I am aware that if any of the statements are willfully false I am subject to punishment.

/s/ Paul Kizel
PAUL KIZEL

DATED: August 5, 1992

By: /s/ Paul Kizel
Paul Kizel
(PK 4176)
RAVIN, SARASOHN, COOK,
BAUMGARTEN, FISCH & BAIME
103 Eisenhower Parkway
Roseland, New Jersey 07068-1072
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Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
CAMDEN, NEW JERSEY

FIRST FIDELITY BANK, N.A. NEW JERSEY (formerly known as First National State Bank), Plaintiff, v. MATTHEW C. HUDSON, Defendant.	Civil Action No. 88-5550 CIVIL ACTION

FINAL JUDGMENT

FILED
MAY 20 1992
At 8:30 M
WILLIAM T. WALSH
CLERK

ENTERED
on
THE DOCKET
on May 22, 1992
WILLIAM T. WALSH, CLERK
By /s/ JTO
(Deputy Clerk)

Plaintiff, First Fidelity Bank, N.A., New Jersey, having filed a motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, and the court having filed opinions dated October 3, 1990, February 1, 1991, and June 18, 1991, and the parties having entered into a stipulation dated May ___, 1992;

IT IS ON THIS 17th day of May, 1992;

ORDERED AND ADJUDGED, that the Plaintiff, First Fidelity Bank, N.A., New Jersey, be granted summary judgment against Defendant, Matthew C. Hudson, in the sum of $13,763,795.05 with interest thereon from this date at the rate of 4.40% as provided by law.

/s/ John F. Gerry
HONORABLE JOHN F. GERRY
CHIEF JUDGE, UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF NEW JERSEY